

## **‘Demeaning’ to portray counsellor as HIV-positive sex worker – court**

Though the world is moving towards de-stigmatising HIV/AIDS, it is still not difficult to imagine a court awarding damages to someone who is publicly – but either without their permission or else incorrectly – said to be living with the condition.

It's surely even more likely to result in damages when someone is, completely wrongly, identified in a caption with her photograph as 'an HIV positive sex worker' waiting at a clinic to be attended. That is exactly the situation in which a Kenyan woman recently found herself. Identified only as MM, she was a community mobiliser with a special clinic working among people with HIV/AIDS. The clinic where she worked was funded by the International HIV/AIDS Alliance, a network of more than 1 000 varied organisations all involved in responding to HIV/AIDS and tuberculosis in Kenya.

At some stage during her employment, her photograph appeared on the web site of the Alliance, together with the caption mis-stating who she was and what she was doing in the picture. Once she had seen that caption associated with her photograph, MM headed to the HIV/AIDS Tribunal where she asked for damages for emotional and psychological distress.

The Tribunal found in her favour and awarded her Ksh 1 500 000 (about \$15 000) which in turn sparked an appeal by the Alliance, argued in the High Court, Nairobi. One of the main issues raised by the Alliance in its defence was that MM had given her signed consent to a photographer taking her photograph for use by the Alliance. The organisation also argued that it had been wrong of the Tribunal to find that it was demeaning to insinuate that she was a sex worker and to hold that she had been defamed by the caption.

It was undisputed, said the High Court, that she had agreed to let the Alliance use her photograph for 'education, promotional and fundraising'. There had, however, been no agreement on how a caption for her photograph was to be worded.

The Alliance said this had been left to her employer and its agents 'who employed creative liberty taking into account the HIV status of the respondent, the environment and background of the image as well as the intended result of the use of the photograph in line with the article'. In addition, said the Alliance, MM knew the work that her employer was doing in the HIV/AIDS field, and when she gave her consent to the use of her image, this could be seen as an agreement by MM that her employer 'would use her image to advance' its work.

MM had a rather different take on the matter, saying that the photograph was not even taken at the place identified in the caption – a specialised treatment centre for the treatment of commercial sex workers with HIV and other transmitted diseases. She said she worked as a counsellor, teaching women and girls exposed to commercial sex work to quit the trade and engage in safer methods of earning an income. The caption thus injured her reputation in those circles.

Judge Joseph Serگون said he was convinced that her photograph was 'inappropriately used contrary to the law and not in line with (MM's) consent'. Further, he was convinced that her photograph, as used, portrayed her 'as a

prostitute'. Clearly, she had not agreed to have her image used to portray her in this way, and he found no fault with the tribunal's decision in her favour on these issues.

Following this the court had to resolve a second issue: whether she was entitled to a damages award. The Alliance argued that the tribunal should not have ordered her to be paid damages since she had given 'an informed consent with no restrictions'. Further, the Alliance claimed that her photograph, and the caption, 'did not in any way result (in) emotional and psychological distress'.

After hearing MM's own version and the evidence of commercial sex workers who testified in the matter, the judge concluded that she had indeed suffered 'damage and harm' and the tribunal had been correct in awarding her damages for emotional and psychological distress. He thus dismissed the appeal, with costs.

### Judgment

- Carmel Rickard